

<b>Examiner-Initiated Interview Summary</b>	Application No.	Applicant(s)	
	09/831,094	BERNKLAU ET AL.	
	Examiner	Art Unit	
	Darren W. Ark	3643	

**All Participants:**

(1) Darren W. Ark.

(2) Dennis Dupray.

**Status of Application:** RCE filed 1/30/2004

(3) Joseph Kovarik.

(4) Dr. Louis Bjostad.

**Date of Interview:** 24 June 2004

**Time:** 1:00pm EST

**Type of Interview:**

- ☒ Telephonic  
☐ Video Conference  
☐ Personal (Copy given to: ☐ Applicant ☐ Applicant's representative)

Exhibit Shown or Demonstrated: ☐ Yes ☒ No

If Yes, provide a brief description:

**Part I.**

Rejection(s) discussed:

*Rejections of the Final Office Action mailed 5/20/2003*

Claims discussed:

10, 25, 45, 46

Prior art documents discussed:

*Prior art of record, particularly Schmittmann 5,394,643 and Snell et al. 6,158,166, and the non-patent literature by Gerard Nicolas*

**Part II.**

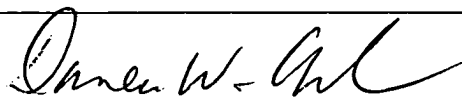
**SUBSTANCE OF INTERVIEW DESCRIBING THE GENERAL NATURE OF WHAT WAS DISCUSSED:**

*See Continuation Sheet*

**Part III.**

- ☒ It is not necessary for applicant to provide a separate record of the substance of the interview, since the interview directly resulted in the allowance of the application. The examiner will provide a written summary of the substance of the interview in the Notice of Allowability.  
☐ It is not necessary for applicant to provide a separate record of the substance of the interview, since the interview did not result in resolution of all issues. A brief summary by the examiner appears in Part II above.

**DARREN W. ARK**  
**PRIMARY EXAMINER**



(Examiner/SPE Signature)

(Applicant/Applicant's Representative Signature – if appropriate)

Continuation of Substance of Interview including description of the general nature of what was discussed: Examiner initiated discussion by seeking affirmation that the concentration of CO<sub>2</sub> in atmospheric air is approximately .036% by volume and Applicant agreed. Examiner stated that with regard to claim 10, that the Schmittmann patent discloses the basic steps of the method as claimed including the provision of an emitting source which emits CO<sub>2</sub> at a concentration of 30% by volume which meets the range as claimed of "approximately at least 0.2% by volume". Applicant argued that the Schmittmann device is for killing ants and not for attracting termites and that further there are no openings in the enclosure for termites to pass therethrough. Dr. Louis Bjostad stated that the 30% by volume CO<sub>2</sub> would be lethal to termites. Examiner suggested amending the claims such that either the upper limit of the CO<sub>2</sub> concentration be non-lethal/physically harmful to termites or that the enclosure has "openings defined through a portion of the enclosure" to overcome the large opening at the bottom of the dome in Schmittmann which is not defined through a portion of the enclosure and the inlet and outlet ports (4, 5) of Schmittman which are not capable of allowing termites to pass therethrough. Examiner and Applicant agreed that such limitations would overcome Schmittmann. Examiner stated that the foam material (364) is disclosed as an attractant to termites in the Snell et al. patent since it may release gases such as CO<sub>2</sub> which may be an intoxicant-type attractant to termites (see col. 27, lines 65-end and col. 28, lines 1-32). Applicant's argued that Snell et al. fails to particularly disclose a concentration of CO<sub>2</sub> emitted from the foam material being at least 0.2% by volume. Examiner agreed and stated that the combination of Snell et al. with the Gerard Nicolas article provides evidence that claim 10 is obvious. Applicant argued that the Nicolas article merely cites that certain insects can live in conditions with elevated CO<sub>2</sub> levels and that there is no disclosure in the Nicolas article that termites are attracted to a 0.2% concentration of CO<sub>2</sub>. Furthermore, Applicant stated that the Nicolas article further states that when CO<sub>2</sub> levels reach a certain point, termites will rebuild the tunnels in order to reduce the concentration of CO<sub>2</sub> and that concentrations can range from 0.8 to 2.9% and from 1.2 to 5.2% by volume CO<sub>2</sub> in the nests of termites. Furthermore Nicolas discloses that concentrations of CO<sub>2</sub> of 1.5% to 6.5% have a repellent effect depending on the insect species. Examiner agreed that the combination of Snell et al. and the article by Gerard Nicolas does not render Applicant's desired invention obvious. Applicant argued that this does not constitute a concentration of CO<sub>2</sub> which would attract termites and Examiner agreed. Examiner also raised the issue of inherency with regard to the Snell et al. patent since it appeared that the Snell et al. patent utilizes similar materials comprising cellulose in attracting termites as applicant's desired invention such as wood and cardboard. Applicant argued that it is not inherent in Snell et al. that since the same materials are being used then there must be the same concentration of CO<sub>2</sub> being emitted and that arguments against inherency are referenced in MPEP 2112, that "The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. In re Rijckaert, 9 F.3d 1531, 1534, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993)...In re Oelrich, 666 F.2d 578, 581-82, 212 USPQ 323, 326 (CCPA 1981)...The mere fact that a certain thing may result from a given set of circumstances is not sufficient". Examiner also cited Ex parte Levy, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) which states "In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art." Examiner agreed that it is not inherent in Snell et al. that the termite bait materials emit CO<sub>2</sub> at a concentration at least 0.2% by volume. Applicant also noted that in the amendment filed 11/20/2003 that claim 30 was incorrectly noted as being "Previously Added" when in fact there were amendments thereto and thus accordingly claim 30 should be noted as "Previously Amended" for the record. Applicant requested that the Examiner acknowledge for the record that submission of references from co-pending patent application 09/573,795 filed May 16, 2000 directed to attracting corn rootworms with concentrations of CO<sub>2</sub> is unnecessary in the present application in that such references are not pertinent to patentability of the present claims which deal with attracting termites and the Examiner agreed.